

**BEFORE THE CHIEF INFORMATION OFFICER
STATE OF NORTH CAROLINA
DEPARTMENT OF INFORMATION TECHNOLOGY
Proceeding No. _____**

AMPLIFY EDUCATION, INC.,)
)
Petitioner,)
)
v.)
)
NORTH CAROLINA DEPARTMENT OF)
PUBLIC INSTRUCTION,)
)
Respondent.)

**BRIEF OF PETITIONER IN
SUPPORT OF MOTION FOR STAY**

Petitioner, Amplify Education, Inc. hereby files and serves this brief in support of its Motion for Stay.

This bid protest concerns the procurement by the North Carolina Department of Public Instruction (“DPI”) in RFP No. 40-RQ20680730: Read to Achieve Diagnostics – Software As A Service. The RFP sought a reading diagnostic tool for North Carolina students in kindergarten through third grades to assess reading abilities, and to screen for dyslexia and other indicators of risk for reading difficulty. Amplify, the incumbent contractor that has been serving the State since 2010, submitted a proposal for the contract. The contract was ultimately awarded to another bidder, Imagination Station, Inc. (“ISStation”) on June 7, 2019.

Public records released by DPI a month after the award decision reveal that DPI’s original Evaluation Committee thoroughly evaluated and ranked all proposals by November 2018. The Committee unanimously concluded that Amplify was the top-ranked proposal based on the key legislatively mandated specifications. DPI then rejected its own expert determinations, canceled

the RFP, set up a new committee, unilaterally changed the evaluation criteria and awarded the contract to IStation.

More specifically, after the Committee found Amplify to be the best bidder and recommended moving forward to the BAFO stage with Amplify, DPI purported to “cancel” the RFP in March 2019. During the procurement, DPI provided vendors with no explanation for the cancellation. The reasons DPI has provided for the cancellation since the award have been contradictory, with DIT’s records on the cancellation not matching DPI’s own internal (and invalid) reasons. After the cancellation, DPI purported to begin a new selection process. DPI reconstituted the evaluation committee, with only two of the original committee members.¹ With the original Evaluation Committee’s rankings in hand, DPI altered the evaluation criteria it used. DPI told Amplify in its July 26, 2019 protest denial that it did so “with guidance from DIT,” though it has not shared documentation of that with Amplify. (Request for Hearing, **Tab 1**, Protest Denial Letter, Attachment C, p. 13 of 37.)

Specifically, DPI eliminated the criteria the original Committee had chosen as the most important (and which are listed in the RFP)—all criteria on which Amplify ranked as the top-ranked vendor. It also took less important criteria on which IStation had outranked Amplify and made them the most important criteria in their final award decision. And DPI added two new evaluation criteria that are opaque in their origin and meaning. Amplify was not notified of these substantial changes in the criteria at any point of the negotiations process. And then, months after

¹ Based on the June 7, 2019 Contract Award Recommendation memo, the “decision makers” for the recommended award in June were Erika Berry, Nathan Craver, Thakur Karkee, and Pam Shue. (Request for Hearing, Tab 4, Public Records, pp. 19-20 of 166.) Only the latter two individuals were on the original Evaluation Committee that participated in the consensus meeting in January. Although a couple of individuals from the original Evaluation Committee left DPI between January and June, we believe that the majority of the voting members from the January committee are still at DPI.

an award decision was supposed to be made to allow a smooth rollout, IStation was given the contract award.

This contract award must be stayed. The numerous and serious flaws in DPI's award process plainly violate North Carolina law on competitive procurements. The contract award is substantially likely to be reversed. In the meantime, unless the award is stayed, Amplify and North Carolina educators will suffer irreparable harm, and the approach to reading assessments in North Carolina classrooms will remain in a state of flux. Traditional schools will re-open in a few weeks. If the contract award is reversed, as it likely will be, continuing to roll out IStation is a significant waste of resources, especially since DPI had already stated it will not start formally utilizing IStation results for the purpose of growth measurement until January 2020. And if the contract is ultimately awarded to Amplify, as expected, teachers and students will have to endure the disruption of reverting back to Amplify.

A stay is necessary to preserve the status quo while allowing this protest to be resolved. Indeed, a group of 88 superintendents have already publicly called for a one-year delay in the contract, as have other public education groups. DPI will not be harmed by the stay, because it has already announced it will not rely on IStation results until January 2020.

RELEVANT FACTS

Amplify

Amplify was founded in 2000 and has 19 years of expertise in K-12 education and in technology providing data, technology-supported teacher tools, and instructional resources that help teachers generate student success. Amplify provides services to school districts in all 50 states, and has been pleased to partner with North Carolina for almost ten years to help educators teach children to read by third grade. Amplify has provided K-3 formative and diagnostic literacy

assessment to North Carolina schools since 2005, and has been a provider to the State of North Carolina since 2010.

Read to Achieve Diagnostics – Software As a Service Procurement

North Carolina has a long history of commitment to the selection and use of developmentally appropriate K-3 reading assessments. More specific to North Carolina's current program, in 2012, the North Carolina General Assembly adopted legislation for the North Carolina Department of Public Instruction to implement the Read to Achieve ("RtA") program.

The right to a "sound basic education" is a constitutional right in North Carolina. *Leandro v. State*, 346 N.C. 336 (1997). Reading is the most fundamental aspect of basic education, and to that end, the General Assembly adopted RtA legislation to ensure all North Carolina students can read. Under N.C. Gen. Stat. § 115C-83.1, it is the public policy of the State "to ensure that every student read at or above grade level by the end of third grade and continue to progress in reading proficiency so that he or she can read, comprehend, integrate, and apply complex texts needed for secondary education and career success." Thus, the legislation is intended "to ensure that . . . difficulty with reading development is identified as early as possible," and that "students receive appropriate instructional and support services to address difficulty with reading development and to remediate reading deficiencies." N.C. Gen. Stat. § 115C-83.2(a)(i).

A core component of the Read to Achieve program is "universal screening." Universal screening means the early assessment of all students, with follow-up assessments to monitor progress, as a way to determine which students are at risk for reading difficulties and to determine how educators should respond to improve student outcomes. North Carolina's RtA law requires the State to provide schools with "valid, reliable, formative, and diagnostic reading assessments." N.C. Gen. Stat. § 115C-83.6(a). These assessments must use "developmentally appropriate

practices” to “address oral language, phonological and phonemic awareness, phonics, vocabulary, fluency, and comprehension.” *Id.* § 115C-83.6(b).

In addition to these legislative provisions on universal screening, the General Assembly passed a statute in 2017 (frequently referred to as “House Bill 149”) that focused specifically on screening for dyslexia and other learning difficulties. 2017 N.C. Sess. Laws 127 (Request for Hearing, **Tab 2, Exhibit A**). The law requires “that all students with specific learning disabilities, including dyslexia . . . receive the necessary and appropriate screenings, assessments, and special education services to provide interventions for learning difficulties.” *Id.* § 1. The statute requires the provision of ongoing professional development for teachers on identifying dyslexia and intervening to improve outcomes. *Id.* § 2. The statute also requires local boards of education to “review the diagnostic tools and screening instruments used for dyslexia . . . to ensure that they are age-appropriate and effective,” and to “determine if additional diagnostic and screening tools are needed.” *Id.* § 4.

Cancellation of the 2017 Procurement

Amplify was awarded the most recent statewide “Read to Achieve Diagnostics – Software as a Service” contract after a competitive procurement in 2016. DPI exercised both of its option years, and the contract is now set to expire on August 24, 2019.

In the fall of 2017, DPI issued a new RFP for these services. However, the RFP was cancelled on March 22, 2018. A primary stated reason for the cancellation was the need to “begin again with clarified specifications and additional time for implementation.” (March 22, 2018 email from Michael Beaver of DPI to Amplify; Request for Hearing, **Tab 2, Exhibit B**). Importantly, the cancellation recognized that a fair competition would require sufficient time for implementation, regardless of what bidder prevailed in the procurement.

More recently, in the midst of the current protest, DPI has suggested that the 2017 procurement had to be canceled because of a conflict of interest. Apparently, a member of DPI's Evaluation Committee failed to disclose that she had worked for Amplify for a few months in 2011-2012 as a contractor responsible for scheduling training and handling other logistical items. That person's work had nothing to do with the substance of Amplify's offerings, and had not nothing to do with the RFP that is at issue here.

The 2018 RFP

On September 6, 2018, DPI issued the RFP at issue here. (RFP No. 40-RQ20680730, the "RFP"), available at Request for Hearing, **Tab 2, Exhibit C**.² Though the RFP did not include a specific deadline for a final award, it plainly anticipated an award around the end of 2018. Vendor submissions were due on October 1, 2018, and vendor demonstrations were to be held on October 22-23.

The RFP contains mandatory requirements for bidders to include in their proposed solutions, all of which are dictated by the requirements of the RtA legislation and the General Assembly's 2017 dyslexia statute. Thus, the RFP requires the vendors' proposed solutions to include the following:

- Deliver "adequate classification accuracy," RFP Attachment A, Spec. 4, at p. 25;
- "[A]dequately identify indicators of risk for dyslexia in grades K-3," *id.* Attachment A, Spec. 8, at p. 25; and
- "[A]ssess student progress," using monitoring tools that are "brief," "repeatable," and "sensitive to improvement over time, including short-term

² Having cancelled the 2017 RFP, DPI was required by statute to issue a new RFP so that it could select a reading diagnostic tool by December 1, 2018. The General Assembly required the State Superintendent to issue an RFP and to form an evaluation panel to review the proposals. See 2017 N.C. Sess. Laws 57, § 7.27(b). The statute provided: "By December 1, 2018, the Evaluation Panel, with the approval of the State Superintendent, shall select one vendor to provide the assessment instrument or instruments for the 2019-2010 school year."

change,” *id.*, Section I (“Introduction”), at p. 6; *id.* Attachment A, Spec. 6, at p.25

- “[D]irectly” assess “reading and pre-reading behaviors”, including “oral language (expressive and receptive)” and “accuracy and rate” *See* RFP, Attachment A, Spec. 1 and 2, at 25.

The key policy underlying the RFP, the RtA statute, and any universal screening program aimed at identifying at-risk students is that a solution must provide “developmentally appropriate practices to assess K-3 students,” RFP, Attachment A, Spec. 9, at p. 26; see N.C. Gen. Stat. § 115C.83.6(b).

The definition of “developmentally appropriate” must necessarily vary based on the age of the students, and a clear standard has developed as to the attributes of what is “developmentally appropriate” for students in the early years of elementary school. Many of those attributes can exist only if the reading assessment involves a teacher observing, listening and guiding a student through tasks requiring a student to read aloud or produce sounds and words demonstrating proficiency in key measured skills. Recognizing that live teacher observation and engagement is a prerequisite component of a developmentally appropriate literacy assessment tool, the RFP asks vendors to describe several aspects of their products’ “observation-based practices.” RFP, Attachment A, Spec. 1, 2, at p. 25.

Four bidders submitted bids, including Amplify and IStation.

The Evaluation of the Proposals

DPI appointed an Evaluation Committee to review the bids, consider their merits, recommend finalists for negotiations and BAFO phase, and make a recommendation for the award

of the contract.³ A timeline is attached, showing the various stages DPI and the Evaluation Committee took in the evaluation process. (**Exhibit I** to this Brief.)

At a “Proposal Evaluation KickOff Meeting” for the Committee on October 5, 2018, DPI identified two purposes of the procurement. (PDF, p. 79 of 166.)⁴ First, DPI aimed to find the best reading diagnostic tool to meet the requirements in the Read to Achieve Legislation. Second, the procurement was intended “to satisfy obligations outlined in NC House Bill 149 to screen students for dyslexia in grades K, 1, 2, [and] 3.”

The Evaluation Committee met on November 19-20, 2018 to assess whether the vendors that submitted proposals satisfied the “legislatively mandated specifications,” and to rank the vendors accordingly. (PDF p. 46 of 166.) A “yes” vote in a given area indicated that a vendor conformed to the relevant specification. A “no” vote indicated that the vendor did not confirm. Committee members could vote “maybe” if they were unsure whether the vendor’s solution conformed.

On four of the legislatively mandated specifications—including the crucial requirements that the diagnostic tool screen for dyslexia and be “developmentally appropriate”—all 11 Committee members voted “yes” for Amplify. Zero Committee members voted “yes” for IStation⁵. Amplify received more “yes” votes than IStation for 14 of the 18 specifications. IStation outsourced Amplify on only one.

³ In October 2018, the Committee had 15 members. By the time it took its first vote, as described below, the Evaluation Committee had 11 members.

⁴ The citation to “PDF” is to the 166-page PDF document DPI sent to Amplify on July 12, 2019, in response to Amplify’s public records request, which is attached as **Tab 4** to Amplify’s Request for Hearing.

⁵ Even if the Committee counted “Maybe” as “Yes” for this criteria, Istation would have only garnered 2 votes for dyslexia screening compliance requirement, as 9 members of the Committee voted “No.”

The “Evaluation Consensus Meeting notes” from the November 19, 2018 meeting provide further insight into the Committee’s analysis. (Request for Hearing, **Tab 4**, “PDF” p. 46 of 166.) Those notes show that the Committee unanimously determined that Amplify ranked first in its responsiveness to the legislatively mandated specifications. (PDF p. 75 of 166.) The Committee was also unanimous in its view that Amplify was the top-ranked proposal overall, taking into account the mandated criteria, desired features, and all other factors. (*Id.*) IStation ranked second.

Two weeks later, the Evaluation Committee presented its findings to Superintendent Johnson. The Committee explained that Amplify ranked first overall and IStation ranked second. To reach those overall rankings, the Committee noted that is listed certain criteria in order of importance. Those criteria, and the rankings of Amplify and IStation on each one, were as follows (Fall 2018 Evaluation: Read to Achieve – 2018, Dec. 4, 2018, PDF p. 39 of 166)⁶:

Priority	Evaluation Criteria	Amplify Rank	IStation Rank
1	Substantial Conformity to Specification	1	2
2	RtAD Desired Specifications	1	2
3	Proof of Concept / Demonstration	1	2
4	Vendor Cost Proposal	4	1
5	Strength of References	1	1
6	Vendor Financial Stability	4	2
	Overall Rank:	1	2

The Evaluation Ranking materials accompanying the rankings shed further light on the Committee’s reasoning. These further demonstrated that Amplify’s product was the superior tool on several crucial metrics. As one example, the materials stated: “Istation is not a reliable screener for dyslexia because it lacks some key measures for dyslexia risk factors. . . . This will require multiple tools for assessment.” (PDF p. 42 of 166)

⁶ Even if all “Maybe” votes were counted as “Yes” votes for both vendors, Amplify would be easily ahead in the ranking.

In early January 2019, the Evaluation Committee met to vote to recommend a finalist for negotiations. According to the DPI meeting notes, Superintendent Mark Johnson joined the meeting and discussed his vision of “empowering teachers and giving teachers their time back to teach” and requested voting members to “keep this vision in mind while making recommendations on the vendor(s) for negotiations.”⁷ The Committee still voted to proceed with negotiations with Amplify, with a minority of the committee voting to proceed with negotiations with IStation, in a 6-3 vote. The next steps in the process were to inform the Superintendent of the team recommendation, gather negotiation questions and get team input on the questions, and set up meetings with the finalist vendor. No public records have been disclosed by DPI for the period between January 8 (when the Committee recommended finalist(s) for negotiation) and March 8, when General Counsel Jonathan Sink informed the Committee that the RFP would be canceled.

The Cancellation of the RFP

On or about March 21, 2019, DPI issued a letter (misdated as February 21) announcing the cancellation of the procurement, and informing vendors that DPI would proceed to negotiations with Amplify and IStation. (Request for Hearing, **Tab 2, Exhibit D.**) Though DIT Rule 09 NCAC 06B.0401 requires an agency to cancel a procurement on specific grounds, the letter itself does not provide a basis for the cancellation.

⁷ PDF p. 33 of 166. The meeting notes state that “to maintain integrity of the process [Superintendent Mark Johnson] stepped out and requested the voting team members to proceed with voting.” Records released by DPI show that at least one Committee member perceived his presentation as an attempt to influence the vote, with a DPI employee relaying to another that “MJ came into their voting meeting today to basically (without coming directly out and specifying) tell them how to vote! However, the vote did not go his way so it will be interesting to see how he gets his way on this.” (Request for Hearing, Tab 1, Exhibit C.)

Some reasoning for the RFP cancellation appears in public records, but the reasoning is contradictory and, in some instances, demonstrably false. The minutes of a March 8, 2019 meeting of the Evaluation Committee (PDF p. 13 of 166) state:

One of the voting members breached the confidentiality provisions of the procurement process which jeopardized the legality of this procurement. It should also be noted that the team did not reach a unanimous consensus on the choice of the finalist vendors. Because of these issues the current read to achieve procurement has to be canceled again.

The comment that the Committee “did not reach a unanimous consent” suffered two obvious flaws. First, there was no requirement for unanimity. The Evaluation Committee noted in its November 19, 2018 meeting minutes that “consensus means general agreement and not unanimity.” (PDF p. 46 of 166.) Second, as discussed above, the Committee *had* decided that Amplify offered the best solution, and the majority of the Committee recommended Amplify for BAFO stage at the January 8, 2018 meeting⁸. Even if the Committee could not agree on proceeding solely with Amplify, nothing in the procurement rules required DPI to only negotiate with one vendor. In fact, as described below, DPI did proceed to negotiate with both vendors post “cancellation,” albeit with a newly constituted committee (keeping only two members of the prior committee) and after re-jiggering the evaluation criteria in a way that obviously would benefit IStation.

⁸ According to the October 5 Proposal Evaluation KickOff Meeting, page 10, the process was to rank each proposal relative to other proposals to determine finalists, then participate in BAFOs and only then select and recommend a vendor for contract award. January 8, 2018 Evaluation Consensus Meeting was convened in accordance with these rules to “recommend a finalist for negotiations.” 6 voting members recommended negotiating with Amplify only; 3 voting members recommended negotiating with Istation only; 1 voting member recommended negotiating with both.

DPI has not produced any records showing that the committee could not reach a consensus on recommendation for award, or even reached the stage of deliberating on such an award. The committee was apparently disbanded, and RFP canceled, before proceeding to the BAFO stage with one or both vendors.

DPI then did proceed to negotiate with both vendors, consistent with recommendations from the January 8th meeting. However, an entirely new evaluation committee, using new and different evaluation criteria was convened to evaluate the proposals and recommend the award. That was one of the fatal flaws of the procurement process.

DPI has vacillated in its explanation of the supposed confidentiality breach. A DPI spokesperson told a newspaper reporter that the breach related to the presence of a former Amplify contractor on the Evaluation Committee.⁹ But, as DPI has since admitted, that incident occurred in relation to the 2017 RFP, which had already been canceled. It bore no relation to the 2018 RFP. In the protest meeting, DPI declined to provide any further explanation for the purported breach, except to refer Amplify to the meeting minutes quoted above. In DPI's July 26, 2019 letter to Amplify denying the protest, DPI claimed that the 2018 RFP was canceled because of a January 2019 text exchange between DPI employees discussed above. Yet, DPI gives no explanation as to how this alleged leak affected the integrity of the procurement.

DPI ostensibly gave DIT a completely different explanation for cancellation. On March 25, 2019, a DIT form shows a claim that the cost proposals of Amplify and IStation were "at a disparate price range (so unlike that there is no basis for comparison)." (See Request for Hearing, **Tab 3, Exhibit B** (DIT Approval Form for Cancellation, March 25, 2019.)) There is no indication in the public record that DPI told DIT that it had already fully evaluated the proposals, including on cost, when it sought cancellation.

SOC 2 Type II Compliance

DPI also failed to provide DIT with all the pertinent information about the vendors' SOC 2 certifications. In DPI's Request for RFP Cancellation to DIT, dated March 21, 2019 (Request for Hearing, **Tab 3, Exhibit C**), DPI stated that *"Neither Vendor (Curriculum Associates and NWEA) appeared ready to execute a large, state wide effort, both had significant technical*

⁹ See www.newsobserver.com/news/business/article232712817.html where this information and correction was published in the *News & Observer*.

limitations and compliance with SOC 2 Type II was either absent or scheduled to be completed later.” (Curriculum Associates and NWEA were the other two bidders.) In the case of Curriculum Associates, the memo states that the company plans to complete its SOC 2 Type II audit in the summer of 2019. DIT's own cancellation approval then restates this issue identified by DPI in justifying excluding the vendors from the negotiation, stating that both Curriculum Associates and NWEA “had significant technical limitations and compliance with SOC 2 Type II was either absent or scheduled to be completed later.”

But public records show that IStation *also* has not completed its SOC 2 Type II attestation process. The Consensus Meeting notes from November 19, 2018 state that IStation “agreed to complete the SOC 2 Type II by Spring 2019” in order to meet the requirement to provide a 3rd party attestation (Technical Specification 35). The notes go on to say that “DIT will not permit agencies to issue new contracts for moderate level solutions that have not been received an acceptable 3rd party attestation. Obtaining approval from DIT to award a contract with a vendor that does not already meet this requirement will be challenging.” (PDF p. 61 of 166.) Public records produced by DIT include a May 22, 2019 email from DPI to DIT, sharing a draft BAFO for IStation that includes a roadmap for SOC 2 Type II assessment for the service that shows that only the initial readiness assessment will be complete by June 2019, and SOC 2 Type II evaluation complete in December 2019, with report available in February 2020. In its initial proposal, IStation only submitted a SOC 2 Type II report for its hosting provider, Rackspace (which is akin to Curriculum Associates referencing an analogous report from AWS -- in both cases these reports would only extend to the hosting service, not the software application or the vendor's other security controls). No pre-cancellation public records show DPI disclosing to DIT the fact that Committee

determined that IStation, like the two rejected bidders, have not yet completed SOC 2 Type II attestation.

The Change of Criteria

After the Evaluation Committee had reviewed all proposals, and after it had voted in Amplify's favor twice, DPI appears to have changed the rules of the game in a way that was designed to award the contract to IStation.

In the December 2018 Evaluation Committee meeting, Amplify was ranked #1 on the three criteria the Committee had determined to be most important. It was ranked #4 on two metrics, Vendor Cost Proposal and Vendor Financial Stability, but, again, these were among the least important criteria. However, in DPI's June 7 final award recommendation, Vendor Cost Proposal and Vendor Financial Stability were now ranked as the #1 and #2 most important criteria on a new list of only four total criteria. DPI knew, of course, that Amplify should be ranked #4 on these newly elevated criteria. (*See Request for Hearing, Tab 3, Exhibit D.*)

DPI also proceeded to discard its top three criteria altogether. It created two new criteria: "formative and diagnostic assessment" and "personalized learning." (PDF p. 20 of 166.) It is not clear what "formative and diagnostic assessment" means, as the whole purpose of the RFP is to procure "valid, reliable, formative and diagnostic reading assessments." (RFP p. 6.) DPI's procurement records do not tie this criteria to the RFP. Furthermore, "personalized learning" is not among the required specifications of the RFP is to procure "valid, reliable, formative and diagnostic reading assessments." (RFP p. 6) Instead, one of the 14 non-mandatory "desirable but not required" specifications at the end of RFP's ten pages of specifications makes a reference to "a personalized blended approach to assessment and learning." Amplify was not informed by the RFP or at any point that this would be one of only four award criteria.

Exhibit D to Amplify's July 24 supplemental letter to DPI (Request for Hearing, **Tab 3, Exhibit D**) shows DPI's wholesale change of the criteria from the RFP and original Evaluation Committee to the final award to IStation in June 2019. DPI's July 26 protest letter response creates new justifications for these changes not reflected in any public record. In fact, DPI's original version of its award recommendation admitted that it had only evaluated criteria it deemed "appropriate." (See **Tab 3**, Supplemental Letter at p.8-9.)

In its July 26 letter rejecting Amplify's protest, DPI states that the change in criteria was done "with guidance from DIT", claiming that certain criteria were removed because they were already satisfied for the evaluation committee and others were reworded for clarity. That explanation is at odds with the procurement records, however. First, the specifications in the RFP were specific and clear, and the original Evaluation Committee's criteria already tied into the requirements of the RFP. Second, the fact that some criteria were "already satisfied" should be irrelevant. The Committee's purpose was still to evaluate the proposals on their full merits. The final decision, and the documentation supporting it, must take all relevant considerations into account, regardless of when the Committee decided they were satisfied. Third, there is no logical reason for the addition of the two new criteria, and they certainly do not add clarity. It is not clear what "formative diagnostic assessment" means, since the whole purpose of the RFP is to procure "valid, reliable, formative and diagnostic reading assessments." (RFP, p. 6.) Furthermore, "personalized learning" is not among the required specifications of the RFP. Instead, one of the 14 non-mandatory "desirable but not required" specifications at the end of the RFP's ten pages of specifications makes a reference to "a personalized blended approach to assessment and learning." It is unclear why one of 14 non-mandatory criteria would become one of the four most important metrics for assessing the proposals. Fourth, DPI claims in the denial letter that it obtained DIT's

approval for changing the criteria. But Amplify has not seen any public records showing that DIT gave approval, or that DPI informed DIT of its reasoning. Indeed, DPI's draft award memo claimed that DPI had only considered "evaluation factors deemed appropriate." (Request for Hearing, **Tab 3, Exhibit E**, Section 5.)

The Award to IStation

Unsurprisingly, after changing the rules of the procurement in a way that played to IStation's strengths and deemphasized its weaknesses in compliance with RFP specifications, DPI's reconstituted committee awarded the contract to IStation on June 7, 2019. Yet, even the June 7 award memo documented serious problems about IStation's responsiveness to the RFP. For example, the memo noted that IStation's product is "missing key measures" for testing dyslexia. (Public records, **Tab 4** to Request for Hearing, p. 28 of 166.)

Amplify's Protest

Amplify submitted a protest letter to DPI on June 24, 2019. (**Tab 2** to Request for Hearing.) Nine days later, DPI sent a letter to Amplify's counsel claiming that Amplify's letter was untimely. (**Exhibit A** to this Brief.) DPI pointed to the requirement that the offeror deliver the protest letter "within 15 calendar days" from the award, 09 NCAC 06B.1102(a)(1). The result of this rule, DPI argued, is that Amplify needed to deliver its protest letter by June 22—a Saturday. The letter failed to explain why Rule 6 of the North Carolina Rules of Civil Procedure, which governs the calculations of all deadlines under North Carolina law including under "rules" did not govern. DPI has no ability to alter this statutory rule.¹⁰

¹⁰ In *Murdock v. Chatham Cty.*, 198 N.C. App. 309, 679 S.E.2d 850 (2009), Chatham County purported to interpret a time provision in a local ordinance in a way that conflicted with Rule 6(a). The Court of Appeals rejected the County's position, explaining that "[t]he manner in which time is to be computed in North Carolina is set forth by statute," and pointed to N.C. Gen. Stat. § 1-593. The time period therefore had to be calculated according to Rule 6(a). *Id.* at 314, 679 S.E.2d at 854.

Despite its claim of untimeliness, DPI agreed to hold a protest meeting. Amplify's CEO, Larry Berger, and its counsel both presented. DPI informed Amplify on July 26, 2019 that it was rejecting Amplify's protest.

Irreparable Harm to Amplify and Damage to the Public Interest

While all this was going on, North Carolina educators have been working hard to mitigate the harm to students that will result from this improper award. Many stakeholders advised DPI that the IStation contract should not be implemented immediately:

- A group of 88 district superintendents from across the State, representing the large majority of public school students, urged Superintendent Johnson to delay the implementation of the new reading diagnostic tool until the beginning of the 2020-2021 school year. WRAL, *88 Superintendents Ask NC Schools' Chief to Delay New Reading Test Amid Controversy*, June 27, 2019. (WRAL, *88 Superintendents Ask NC Schools' Chief to Delay New Reading Test Amid Controversy* (June 27, 2019, **Exhibit B** to this Brief.)
- The North Carolina School Superintendents' Association also requested a one-year delay, asking that Superintendent Johnson seek approval for the delay from the General Assembly on the local superintendents' behalf. (**Exhibit C** to this Brief.)
- The Superintendent of the Wake County Public School System, Cathy Moore, wrote separately, echoing the request from the Superintendents' Association but also asking that the Board of Education allow individual school districts to use Amplify's product as an alternative tool for the 2019-2020 school year. Superintendent Moore said that it was "both impractical and disrespectful" to make the transition to Amplify in such a short time frame. She pointed to a one-year delay as the "logical" course. (**Exhibit D** to this Brief.)
- The superintendents of the State's 12 largest school districts told DPI they were unable to implement IStation in the short time frame permitted, and asked Superintendent Johnson to work with the General Assembly to seek a delay that would be "in the best interests of our students." (**Exhibit E** to this Brief.) The 12 superintendents sent a similar request to the State Board of Education. (**Exhibit F** to this Brief.)
- A group known as the North Carolina Families for School Testing Reform joined the calls for a one-year delay, telling Superintendent Johnson that "it is in the best interest of children to continue using the existing literacy

screening tool” while the problems with the contract award are resolved. (**Exhibit G** to this Brief.) Over 350 individuals and groups signed the letter, including the North Carolina Association of Educators, Charlotte Parents for Schools, and Triangle Area Domestic Advocacy.

- A group of 13 members of the North Carolina Senate also called for a one-year delay in the implementation of IStation. They called on the Senate President Pro Tempore to exercise his authority “to provide a Senate review of this process via a Select Committee in order to make sure we are serving the students’ best interests.” (**Exhibit H** to this Brief.)

Absent a stay, Amplify also stands to suffer significant harm. The various injuries to Amplify--including loss of revenue, business relationships, and goodwill--are detailed in an affidavit from Amplify’s CEO, Larry Berger, which is filed along with this brief. *See* Affidavit of Lawrence Berger (“Berger Aff.”) ¶¶ 8-13.

ARGUMENT

I. A Stay Must Be Granted Until This Protest Has Been Resolved.

DIT should stay the award of the contract to IStation. The North Carolina Rules of Civil Procedure apply in contested cases before DIT. 09 NCAC 6B.1105(1). N.C. R. Civ. P. 65 explicitly provides for the issuance of preliminary injunctions. Moreover, any agency has the inherent authority to stay its own actions, and this information technology procurement is under DIT’s jurisdiction.

A petitioner is entitled to a preliminary injunction if it can show a “likelihood of success on the merits of [its] case” and that it is “likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff’s rights during the course of litigation.” *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759 (1983) (quoting *Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977)). Courts should also consider whether the issuance of a preliminary injunction serves the public interest. *See, e.g., Welch v. B & B Realty Investments, LLC*, No. 16 CVS 7562, 2016 WL

2842779, at *5 (N.C. Super. May 13, 2016).

Those factors weigh heavily in favor of a stay here. Amplify is likely to succeed on the merits of the case because the contract award plainly violated North Carolina law. Absent a stay, Amplify will suffer harm: schools will begin using IStation's product, Amplify will lose revenues it will never recover on a contract it should have been awarded, and teachers and school administrators will face a significant administrative burden in reverting to Amplify's product when the contract award is reversed. Educators across the state are requesting this stay of the contract award.

A. Amplify is likely to succeed on the merits of its case.

For several reasons, any of which would be independently sufficient, Amplify is likely to succeed on the merits of its case. DPI's conduct of the procurement process fell short of fundamental requirements for competitive procurements. These requirements exist to ensure that competition for all government contracts in North Carolina is public, open, and fair. The rules allow the State to get the benefits of competition inherent in the marketplace: vendors competing on the quality of services offered, the cost of services, and in delivering the best value to the State.

1. Legal standards

An agency award on a government contract must be reversed if it was awarded in a circumstance where the agency "(1) Exceeded its authority or jurisdiction; (2) Acted erroneously; (3) Failed to use proper procedure; (4) Acted arbitrarily or capriciously; or (5) Failed to act as required by law or rule," to the prejudice of the complaining party. N.C. Gen. Stat. § 150B-23(a).

In awarding a contract, an agency must also follow its own rules and regulations, including the rules contained in its own RFP. The failure to do so is reversible error. *See Humble Oil & Refining Co v. Bd. of Alderman*, 284 N.C. 458, 467, 202 S.E.2d 129, 135 (1974). In addition,

where an agency has discretion, an agency's decision will be found to be arbitrary or capricious if it "indicate[s] a lack of fair and careful consideration" or "fail[s] to indicate any course of reasoning and the exercise of judgment." *Act-Up Triangle v. Commission for Health Servs.* 345 N.C. 699, 707, 483 S.E.2d 388, 393 (1997).

As this procurement was done under the delegation of the Department of Information Technology ("DIT"), DIT regulations set out the method for selecting a best value procurement, including the following:

- The agency's evaluation committee must evaluate bids based *exclusively* on the criteria stated in the RFP. 09 NCAC 06B.0302(1)(h).
- The committee must consider the "technical merit" of each bid, including the responsiveness of the bid to the specific purpose or objective of the RFP. 09 NCAC 06B.0302(1)(f)(ii).
- The agency must also consider factors including whether the vendor complies with industry standards, the vendor's past performance with the state, and the probability of the vendor providing the required service on time. 09 NCAC 06B.0302(1)(f)(iii).
- In evaluating the cost of a vendor's proposed solution, the committee should not merely consider the price of the product, but rather the "State's total cost of ownership." 09 NCAC 06B.0302(1)(f)(i).

Moreover, when a procurement is "cancelled" and an agency proceeds into "negotiations," those negotiations remain subject to the confines of the original RFP. Thus, "*negotiations should not materially alter the intent or scope of the original solicitation document.*" 09 NCAC 06B.0316(e). A failure to meet mandatory RFP requirements cannot simply be fixed by cancelling

a procurement. Furthermore, as to RFP requirements mandated by state law, these requirements apply regardless of any cancellation.

2. The award to IStation was procedurally and substantively defective.

Amplify has already articulated, in its Protest Letter and its Supplemental Letter (both attached to its Request for Hearing), several bases on which the contract award should be reversed. In summary, those issues are as follows.

Amplify's proposal was clearly determined to be superior by DPI, and IStation was deemed not to adequately satisfy critical statutory and RFP requirements. After a rigorous review of the proposals, the original Evaluation Committee voted on whether Amplify and IStation met the "legislatively mandated" criteria. On one criterion after another, the 11 members of the Evaluation Committee unanimously voted "yes" for Amplify—signaling that it met the specification—while IStation received no "yes" votes.

Similarly, the Evaluation Committee agreed that Amplify's tool met the State's requirement that the solution be "developmentally appropriate." But no Committee member thought IStation satisfied that requirement, and seven Committee members specifically voted that IStation was *not* developmentally appropriate. The Evaluation Committee itself concluded—before DPI leadership interfered to ensure the contract was awarded to IStation—that Amplify met the requirements of the RFP and IStation did not.

The March 2019 cancellation of the RFP was unfounded, and DPI's justifications for the cancellation are not consistent nor valid. The procurement file shows that DIT understood that DPI sought a cancellation because the cost proposals of Amplify and IStation "are at a disparate price range (so unlike that there is no basis for comparison)." (DIT Approval Form for Cancellation, March 25, 2019.) But DPI had *already* reviewed all the proposals fully by that point,

had *evaluated the costs* of each proposal, and had ranked the proposals based on cost (along with all the other evaluation criteria).

The reason given to DIT for the cancellation does not match the bases provided in DPI's procurement records. The minutes of the March 2019 meeting of the Evaluation Committee say that the Evaluation Committee did not reach "unanimous consent," and that "one of the voting members breach the confidentiality provisions of the procurement process." (PDF p. 13 of 166.) In fact, the Evaluation Committee had already evaluated all the proposals on all factors, including cost, when the cancellation was sought. And there was no unanimity requirement. As the original Evaluation Committee noted in its November 19, 2018 meeting minutes, "consensus means general agreement and not unanimity." (PDF p. 46 of 166.)

DPI also changed the evaluation criteria and ranking of importance of criteria after reviewing all the proposals. It did so to the apparently direct benefit of IStation, after it had already reviewed and evaluated all the proposals. In short, after DPI rated Amplify as the 4th best proposal on two of the least important RFP criteria, DPI reordered these two criteria to be the *most* important criteria. DPI then invented two new criteria not listed in the RFP, and threw out the most important criteria of the RFP. Only by "changing the rules of the game" was DPI able to justify an award to IStation.

Any of these individual flaws, considered alone, would require the contract award to be reversed. Considering these flaws in combination, there can be little doubt Amplify will prevail on the merits of this protest.

In its letter rejecting Amplify's protest after the protest meeting, DPI offers a number of post-hoc rationalizations for the flawed contract award. Many are misleading, and none change

the conclusion that the award to IStation must be reversed. In fact, there is a puzzling inconsistency between some of DPI's statements and the plain requirements of the RFP. For example:

- DPI claims there is no statutory requirement that the diagnostic tool effectively screen for dyslexia. It points to the session law addressing dyslexia screening, and claims the law does not apply to the choice of screening tool. However, the evaluation of this procurement was governed by the requirements of the RFP. The RFP plainly required "a solution that could 'adequately and accurately identify indicators of risk for dyslexia in grades K-3 as outlined in NC Session Law 2017-127.'" (Request for Hearing, **Tab 2, Exhibit C**, RFP p. 26.) DPI's own Evaluation Committee records show they treated it as a requirement as well.
- DPI portrays the cancellation of the procurement was necessary as a result of improper behavior that infected the procurement process. As its very first example, Amplify claims that one DPI employee "did not disclose that she had previously been paid by Amplify, her most recent employer before the Department." Even if this attenuated "conflict" was a basis for cancellation, DPI admitted that it was a reason for canceling the 2017 procurement. DPI's inclusion of this purported reason for cancellation, and as its first listed reason, proves that the cancellation of the 2018 RFP was flawed.
- DPI now claims (with no support in its procurement records) there were flaws in the original Evaluation Committee's procedure for ranking bids. But its explanation of those supposed flaws is confounding. Amplify has

explained exactly how DPI apparently reverse-engineered the evaluation process to make sure IStation was ultimately awarded the contract.

- DPI insists that Amplify is wrong to say that Amplify's proposal was responsive to the RFP and IStation's was not. But DPI does not convincingly explain why Amplify is wrong, as Amplify is simply relying on DPI's own uncontradicted procurement record for these points. DPI post-hoc justifications have no support behind them. The Evaluation Committee, for example, stated that "IStation is not a reliable screener for dyslexia because it lacks some key measures for dyslexia risk factors. . . . This will require multiple tools for assessment." (Request for Hearing, Tab 4, Public Records, p. 42 of 166.) An agency cannot satisfy the requirements for competitive procurements using post-hoc justifications.
- DPI's protest letter denial depends on selectively disregarding unfavorable aspects of the record. DPI claims that members of the original Evaluation Committee were biased, and that the materials showing the evaluation of the relative merits of Amplify and IStation must not be believed. Yet, they have no documentation to support any of these claims. Accepting such unsupported claims as valid justifications would render the whole process of competitive procurements immune from scrutiny.

Because DPI is likely to succeed on the merits of its challenge, DIT should stay the contract award.

B. Amplify is likely to sustain irreparable harm unless the stay is issued.

Amplify is likely to sustain irreparable harm unless this stay is issued. Alternatively, a stay is necessary to protect Amplify's rights during the course of this litigation. Without a stay, schools across the state will begin using IStation in August. Amplify expects that the contract award to IStation will eventually be reversed, and that Amplify will be selected, in accordance with the original evaluation committee's conscientious, thorough evaluation. But this will take time.

The resolution of this dispute will not end the matter because the school calendar complicates the time it would take to transition from IStation back to Amplify. Once the school year begins and teachers start using IStation in their classrooms, it will be more difficult for them to transition back to Amplify during the school year after the award to IStation is reversed. The systems and technology for IStation will already be in place. Why they need to be in place is unclear, as DPI has already decided to delay the counting of IStation results until January 2020. Thus, DPI has almost granted a stay itself, but not a meaningful one, because it is apparently paying IStation to implement a contract that is not going to actually be counted for assessing students.

The calls from educators and other stakeholders around the State to delay implementation of the diagnostic tool illustrate the logistical hurdles in transitioning from one reading diagnostic tool to another. For example, the Superintendent of Wake County Public Schools explained that it would be "impractical and disrespectful" to assume that the transition to IStation could be made by the beginning of the school year. The superintendents of 88 of North Carolina's 115 local school districts agreed. Similar transitional difficulties will exist when Amplify is reinstated. But unlike the current attempted transition to IStation—which occurred during the summer—the decision to reverse the contract award could come at any time during the school year.

Amplify stands to lose significant revenues for the period of time the contract with IStation is improperly in effect. (Berger Aff. ¶ 9.) As a result of the State's sovereign immunity, Amplify will be unable to recover damages for its loss of revenue during this period. Amplify's reduced bid was for \$3.8 million per year. Losing \$1.9 million for half the year will be a significant loss for Amplify.

Amplify also stands to suffer significant harm to its long-standing relationships with North Carolina educators. (Berger Aff. ¶ 10.) The forced move to IStation goes against the wishes of many educators and administrators, but nevertheless forces them to focus their limited time and resources on the transition. (*Id.*) Amplify's attempts to continue its outreach in North Carolina have already been impacted. (*Id.*) If a stay is not granted and the IStation era begins, Amplify's relationships will be eroded. Even if Amplify can regain some ground if the contract award is reversed, its relationships with educators will still be harmed.

Beyond North Carolina, the transition to IStation will impair Amplify. Amplify's contract with the State has been a significant selling point elsewhere. (Berger Aff. ¶ 11.) Not only has Amplify lost that selling point, but IStation is now able to promote its new business in North Carolina. (*Id.*) Ground unfairly gained by IStation now will not be easy for to recover. (*Id.*) This impairs Amplify's ability to compete with a major competitor. (*Id.*)

Amplify's reputation among the public at large--in North Carolina and beyond--will also be harmed beyond repair. *See, e.g., Pinehurst Surgical Clinic, P.A. v. DiMichele-Manes*, 277 N.C. App. 225, 741 S.E.2d 297, at *6 (2013) (loss of reputation and goodwill support a finding of irreparable harm). Forcing teachers and administrators to switch back to Amplify any time in the coming school year will harm their mission and harm their students. For Amplify to be involved in this disruptive cycle, even without fault of its own, will do no favors to Amplify's standing in

the education community, among parents, and with the public at large. Amplify's name has come to be associated over the years with a dedication to educators and students, and with its innovative tools. (Berger Aff. ¶ 12.) The longer the current controversy goes on, the more that reputation will be tarnished by a flawed bid process that was beyond Amplify's control. (*Id.*)

Amplify is of course doing everything it can to minimize the impact of the above harms. But its efforts are costly and disruptive to its business. (Berger Aff. ¶ 13.) Amplify will also incur significant legal fees and other expenses. (*Id.*)

C. A stay would serve the public interest.

A stay would also protect the interests of North Carolina's teachers, school administrators, and students. Ultimately, Amplify expects to prevail on the merits and to be awarded the contract. But this protest process will leave schools in limbo. Teachers will ultimately suffer, and so will their students.

Educators and district leaders have proposed a solution. They have called for a delay. 88 North Carolina superintendents have asked DPI to delay the implementation of the new reading diagnostic tool until the beginning of the 2020-2021 school year. A letter from the 12 largest school districts, and a separate letter from the Superintendent of the Wake County Public Schools, reinforced the need for a delay. North Carolina Families for School Testing Reform concurred, urging Superintendent Johnson for "no less than a one-year delay" in the implementation of the contract in a July 9 letter signed by more than 350 individuals and organizations "representing tens of thousands of North Carolinians." As that group has made clear, while the protest proceeds, "it is in the best interest of children to continue using the existing literacy screening tool."

Delaying implementation, as the interested public has requested, would best serve the interests of the students in North Carolina and all who work to ensure their success.

CONCLUSION

For the reasons set forth above, Amplify requests that DIT stay the performance of the contract awarded under the RFP pending the resolution of this proceeding. Amplify further requests an expedited hearing and ruling on this motion, no later than the week of August 19, 2019, before the start of the traditional school calendar for the majority of North Carolina students.

This the 2nd day of August, 2019.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the foregoing in the above-entitled action upon all other parties to this cause by e-mail and U.S. Mail addressed to the following parties::

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This the 2nd day of August, 2019.

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